



October 28, 2010

EX PARTE BY ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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**Re: Developing a Unified Intercarrier Compensation Regime, WC Docket No. 01-92,
and Establishing Just and Reasonable Rates for Local Exchange Carriers,
WC Docket No. 07-135**

Dear Secretary Dortch:

Pac-West Telecomm, Inc. ("Pac-West") hereby submits this notice of *ex parte* regarding its meeting with Zac Katz, Legal Advisor to Chairman Genachowski, on October 27, 2010. Jim Falvey and I attended the meeting on behalf of Pac-West.

During the meeting, Pac-West distributed the attached presentation, which served as the basis for discussion.

Respectfully submitted,

/s/

Michael B. Hazzard
Counsel to Pac-West Telecomm, Inc.

Attachment

cc: Zac Katz (via email)

Pac-West

Telecomm, Inc.

Intercarrier Compensation Notice of Proposed Rulemaking

Jim Falvey, VP, Regulatory Affairs
Pac-West Telecomm, Inc.

Michael Hazzard
Arent Fox, LLP

October 27, 2010

Preliminary Considerations

Background Leading Up to the NPRM

- Current NPRM:

- Access Stimulation NPRM focused on access charge stimulation by rate-of-return regulated rural carriers
- Issued October 2007
- Subject of extensive comment on access stimulation issues

- Future NPRM:

- Intercarrier Compensation NPRM taking broader view of intercarrier compensation issues
- In March 2010 National Broadband Plan, FCC announced intention to issue an NPRM to address, among other things, intrastate access charges, "traffic pumping," "phantom traffic," and VoIP traffic
- FCC announced need for new NPRM to provide for notice and comment on wide-ranging intercarrier compensation issues beyond the narrow topic of rate-of-return access stimulation
- National Broadband Plan was not an NPRM or an Order of the FCC, but rather a roadmap for future broadband development
- Focus on intercarrier compensation issues was overshadowed by national broadband development issues

Incremental Prospective Implementation

- FCC needs to make clear that implementation will be prospective
- Many carriers (e.g., Sprint and Verizon) have already begun to withhold millions in intercarrier compensation to CLECs based on their vision of what the rules should look like in the future
- By underlining that future rule changes will be prospective, the FCC may help stem the tide of self-help that is currently disrupting the industry
- The Commission should address such self-help tactics on a parallel track with other issues being considered in the NPRM
- The Commission has always favored incremental implementation and should request comment on how any changes in all areas (intrastate access, VoIP, phantom traffic, etc.) should be phased in

The NPRM Should Consider the Impact on Local Competition

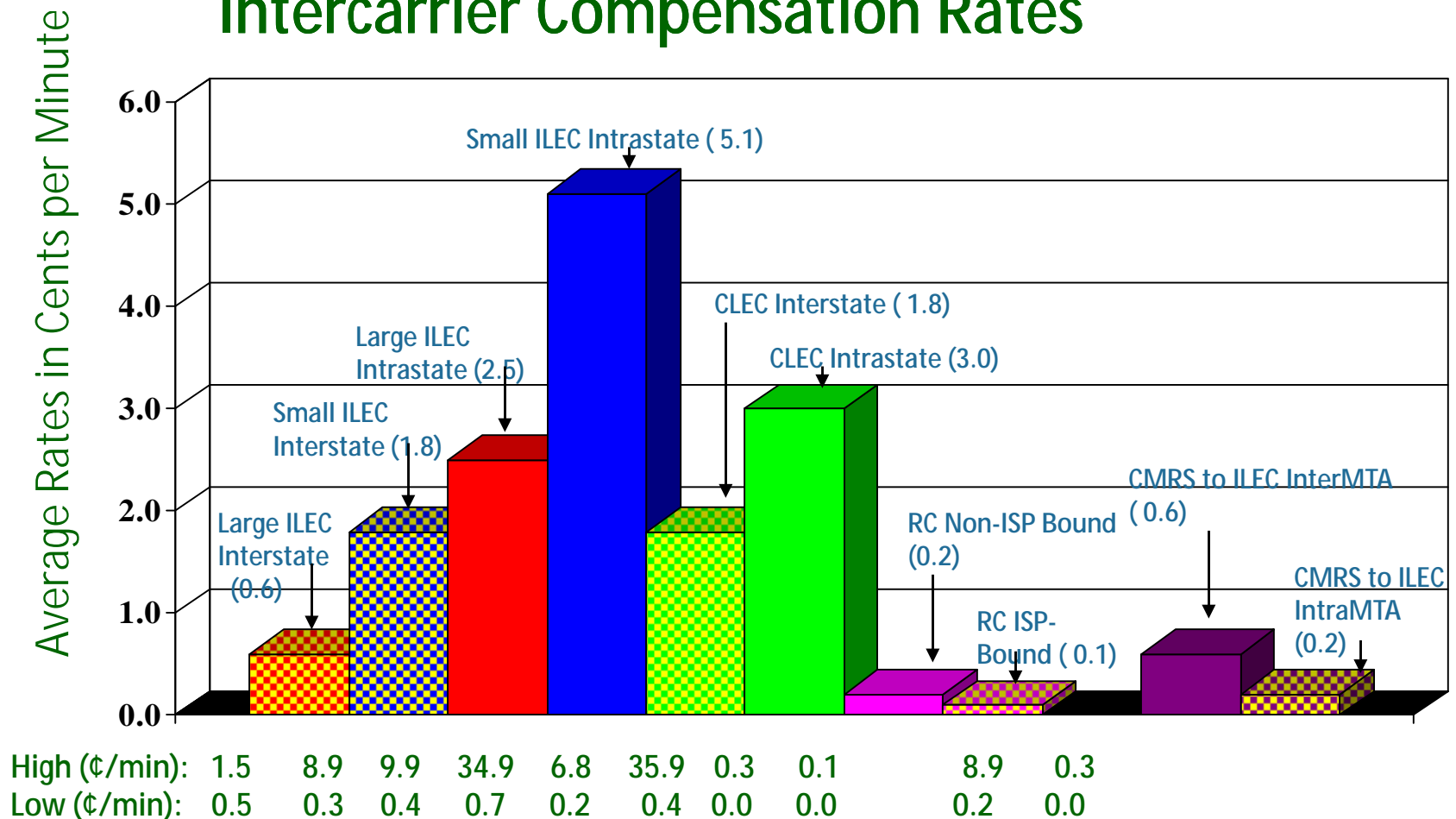
- The National Broadband Plan was focused on broadband deployment
- The FCC needs to review the impact of intercarrier compensation issues on the development of local competition
- Telecom Act premised on principle that Section 251(b)(5) intercarrier compensation is a critical building block for local competition (see § 271(c)(2)(B)(viii))
- Impact of changes to intercarrier compensation rules on local compensation should be carefully explored in the NPRM
- To date, no record has been developed on this critical issue

Key Commission Findings on Inter-carrier Compensation

- The Commission has made specific findings relating to inter-carrier compensation (ISP Remand Order; 2005 FNPRM)
 - The cost of terminating traffic does not vary by geography or traffic type
 - Regulatory arbitrage results from having widely varying rates for the same terminating functions
 - No contrary evidence has been filed in the record
- Long-term key to eliminating arbitrage is to move to uniform rates, starting with moving intrastate to interstate
- Interim solutions that are not carefully designed could lead to unintended consequences and disrupt the market

Current Regulatory Patchwork of Rates

Intercarrier Compensation Rates



The NPRM Should Obtain Input from All Impacted Through Proper Notice

- The only issue that has been noticed in any meaningful way is ILEC and CLEC access stimulation for rate of return carriers
- National Broadband Plan was not an NPRM
- Access stimulation NPRM provided substantial notice on access stimulation by rate-of-return ILECs (first 14 pages), substantially less on access stimulation by rural CLECs (paras. 34-36), still less on the broader issue of access stimulation (para. 37), and four sentences on “other intercarrier issues.”
- Adequate notice has been offered on the issue of access stimulation by rate-of-return ILECs
- The Commission may also want to proceed on the issue of access stimulation by rural CLECs competing with rate of return ILECs
- These business models have never been part of Pac-West’s business plan, although rules must be closely tailored to ensure no unintended consequences
- Adequate notice has not been offered on all other CLEC access stimulation and intercarrier compensation issues (paragraphs 37-38)
- National Broadband Plan specifically contemplated further notice and comment on these issues in the NPRM to be issued later this quarter
- The FCC will gain experience from implementing rural access stimulation rules and can then determine whether further rulemaking is necessary

What is the role of the state commissions in intercarrier compensation reform?

- Consideration of the role of the state commissions in intercarrier compensation reform is critical
- Complementary state and federal roles part and parcel of sections 251 and 252
- Many, particularly larger state commissions, have been very engaged on intercarrier compensation issues
- Call setup and duration rates addressed the issue of longer duration calls in many states (e.g., California, Florida, Texas)
- State commissions setting reasonable compensation for wireless traffic
- The Commission should consider with each issue what the state role will be in resolving the issue

Definitional Issues

- The Commission needs to carefully define each of the key terms to be considered in the NPRM
- What is “access stimulation”?
- What is “traffic pumping”? What is “traffic stimulation”? What is a “chat line” as opposed to a “conference bridge”? In particular, how are high volumes of one type of call to be distinguished from others?
- The National Broadband Plan talks about curtailing “business models that make a profit by artificially inflating the number of terminating minutes”
 - What does it mean to “artificially” stimulate minutes?
 - Should voluntary calls made by subscribers of unlimited wireless and wireline calling plans qualify as “artificially” stimulated minutes?
- “Traffic dumping” vs. “traffic pumping”

The Commission Should Not Complete Its Rulemaking Prior to Its NPRM

- The Commission should avoid a rush to judgment without quantifying ostensible problems
- The record contains a great deal of heat but very little light
- There has been no credible quantification of the amount of traffic or revenue subject to each of the practices addressed
- There have been a large number of ex partes declaring a crisis, but with no data whatsoever to quantify
- For example, from USTA's October 8 ex parte:
 "arbitrage schemes based upon free conference calling, chat lines and other services have indeed developed and, in the absence of Commission action to deter them, have thrived."
- No citation and no support in the ex parte

Rural ILEC and CLEC Access Stimulation

Solutions to Rural ILEC and Rural CLEC Access Stimulation

- Pac-West is not opposed to the Commission addressing rural ILEC and rural CLEC access stimulation, despite the fact that the problem has not been identified and quantified
- Such rules target the highest end of available rates
- Through such rules – and through leveling of intra- and interstate access rates – the Commission is addressing rate inequality from the high end of the scale to the low end as it should be
- Pac-West is not opposed to rules based on rural traffic volumes for rural ILECs and rural CLECs that trigger lower rates, provided they are narrowly tailored
- Pac-West would be concerned about a rule broadly targeting, for example, “traffic pumping kickback schemes,” because the Commission has yet to quantify or define terms such as “traffic pumping kickback schemes”
- The NPRM should provide a more detailed record before addressing non-rural CLEC access stimulation

Traffic Pumping

NPRM Issues Relating to Traffic Pumping

- Definitional issues: what is traffic pumping?
- Is traffic pumping limited to local calling? Section 251(b)(5)?
- What is the line between access stimulation and traffic pumping?
- When we talk about “traffic pumping,” are we really talking about revenue sharing?
- Does the substantive nature of the traffic matter?
 - For example, would a local conference bridge for business calling be treated differently than a sports chat line or other chat lines?
 - What issues does this raise? (e.g., free speech, privacy, enforcement)
 - If “artificial” stimulation is the issue, what types of “artificial” stimulation, not already illegal, are to be addressed?

Identification and Quantification of the Problem

- Are we seeing an increase in pricing of unlimited calling plans or are rates trending downwards?
- What is the total amount of revenue, minutes of use at issue?
- Should the Commission consider working from the high end of the rate structure down to the low end?
- Argument to address rural and intrastate issues first

What is the impact of traffic dumping?

- What is the impact of unlimited calling plans on the generation of high volumes of traffic?
- Should carriers with unlimited calling plans be entitled to relief from “traffic pumping”?
- Should the Commission draw a line between robo-calling and voluntary calls made by ordinary customers making local calls?
- Should the Commission regulate the length of calls made by customers on unlimited calling plans?
- Is it appropriate to address issues on the low end of the rate spectrum before finishing addressing issues on the high end?

What is legal and illegal stimulation?

- Is it traffic pumping:
 - to take out a full page ad to stimulate additional calling?
 - to hold a radio call-in contest of the kind prevalent since the inception of radio?
 - to have a radio request line for long distance dedications?
 - to announce that tickets go on sale Saturday at 10 a.m.?
 - to tell customers to text the number on your screen in the next two hours in order to vote for your favorite contestant (and market increasingly expensive baskets of texting minutes of use)

Revenue sharing does not address the issue

- Companies should always be entitled to market their services
- How are free speech issues implicated by restrictions on certain types of marketing?
- Revenue sharing focuses on who receives the revenue, not whether revenue is generated by phone calls
- If traffic pumping relates to section 251(b)(5) calls, why address high volume calling at the lowest rates while still permitting more lucrative high volume calling at the highest rates

Revenue Sharing

Revenue Sharing Issues in the NPRM

- Should revenue sharing be regulated?
- Should revenue sharing be regulated at the lowest rate levels?
- If a carrier can afford to share revenue at \$0.0007, or state rates as low as \$0.001, shouldn't the Commission encourage such efficiency?
- If reciprocal compensation rates represent TELRIC cost plus a reasonable profit, is further regulation necessary?
- Why would the Commission determine what a company does with revenue that it derives from its lowest regulated rates?
- Wasn't the issue of longer call holding times addressed by the ISP Remand Order and call set up and duration rates established by the state commissions?

Marketing Practices in General

- Will the Commission reach out to regulate other forms of carrier-to-carrier marketing relationships?
- Is it acceptable to host customers in sky boxes or golf tournaments, but not acceptable to share revenue so customers can build out their networks?
- What other types of marketing practices will the Commission regulate and how does it not slide down a slippery slope?
- What is the state role in regulating the marketing practices of carriers?
- Will the Commission ever be able to regulate effectively intracorporate revenue transfers for companies in local, long distance, ISP, and so on?
- What type of reporting should be required of larger multi-segment entities?
- Should the Commission consider a gating or forcing mechanism that would only permit carriers that certify to certain marketing limitations to file complaints on traffic pumping?

Connection to Self-Help

- Self-help is already rampant in the industry
- Carriers today, including Qwest, Verizon, and Sprint, routinely engage in self-help
- Self-help represents \$10 to \$15M of unpaid revenue for Pac-West
- Carriers refuse to pay intercarrier compensation invoices on the pretext that traffic is “traffic pumping” or “access stimulation”
- Problem is endemic before the FCC has initiated its rulemaking
- Will there be a further corrosive impact, eroding the payment of intercarrier compensation altogether, based upon unfounded allegations of traffic pumping and access stimulation?
- How will the Commission ensure that intercarrier compensation obligations, routinely flouted today, are enforced in the wake of new rules?
- Aside from self-help, the system may well be working better today than it would be if marketing fee, traffic pumping or other new rules were implemented by the Commission

Wireless to Landline Compensation

State Commission Role Firmly Established

- Wireless carriers continue to terminate millions of minutes of use without compensation
- The North County case established that state commissions enforce collection of “reasonable compensation”
- Pac-West filed complaints against Sprint, Verizon, T-Mobile and Leap in California
- Complaints have been stymied by aggressive litigation from these four carriers
- Other carriers have reasonably settled with Pac-West at relatively low rates

State Reasonable Compensation is Appropriate

- Pac-West supports the current system of states establishing reasonable compensation
- Delays at the state commissions lead to continued free termination for wireless carriers
- If North County is not affirmed, the Commission should extend the T-Mobile decision to CLECs
- If North County is affirmed, it's more important to let states quickly apply cost-based rates so that CLECs are fairly compensated for past termination that has been withheld, in violation of the FCC's existing rules
- The Commission should be very leery of wireless efforts at the federal level to delay the implementation of the North County order at the state commissions
- Wireless goal is to continue free termination indefinitely